No. 07-143

In the Supreme Court of the United States

GERARD A. BAILEY,

Petitioner,

v.

PAPA JOHN'S USA, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether Petitioner has presented compelling reasons to grant the Petition, where the Sixth Circuit's Opinion affirming the District Court's application of the *McDonnell Douglas* analytical framework does not conflict with a decision of this Court or a Court of Appeals, nor does it implicate an important federal question that has not been settled by this Court.

II. Whether Petitioner has presented compelling reasons to grant the Petition, where the Sixth Circuit's Opinion affirming the District Court's imposition of sanctions under Fed. R. Civ. P. 11 and attorney fees under 28 U.S.C. § 1927 does not conflict with a decision of this Court or a Court of Appeals, nor does it implicate an important federal question that has not been settled by this Court.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Papa John's USA, Inc. is a wholly owned subsidiary of Papa John's International, Inc., a publicly-owned corporation.

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INTRODUCTION

Petitioner has presented no "compelling reasons" for his Petition for a Writ of Certiorari to be granted. *See* Sup. Ct. R. 10. Petitioner has failed to demonstrate that the Sixth Circuit's December 20, 2006 Opinion affirming the District Court's application of the *McDonnell Douglas* analytical framework is in conflict with a decision of this Court or another Court of Appeals. *See* Sup. Ct. R. 10(a)-(c). Likewise, Petitioner has failed to demonstrate that the Sixth Circuit's June 11, 2007 Opinion affirming the District Court's imposition of sanctions under Fed. R. Civ. P. 11 and attorney fees under 28 U.S.C. § 1927 is in conflict with a decision of this Court or another Court of Appeals. *See* Sup. Ct. R. 10(a)-(c). In fact, Petitioner has not even carried his significantly less strenuous burden of showing that the District Court's imposition of sanctions and attorney fees was an abuse of discretion – which would, in any event, constitute insufficient grounds to grant the Petition. *See* Sup. Ct. R. 10(a)-(c).

Furthermore, Petitioner has failed to demonstrate that the Sixth Circuit, in either of its two opinions, decided an important federal question that has not been settled by this Court. *See* Sup. Ct. R. 10(a)-(c).

Petitioner has failed completely to demonstrate any compelling reasons for this Court to grant the Petition. Accordingly, the Court should deny the Petition.

STATEMENT OF THE CASE

Petitioner is an African-American male who worked at Papa John's Store 83 in Oak Grove, Kentucky near the Fort Campbell military base. Petitioner was Store 83's general manager from the date of his hire in 1995 until his termination in 2000. Petitioner was required to work a minimum of forty hours per week, received a fixed base salary regardless of hours worked, and was not entitled to overtime pay. (Ct. App. JA 600-01). Store 83 initially prospered during Petitioner's tenure, but sales peaked in 1996, leveling off by 1997. (Ct. App. JA 617). Petitioner received two raises during his employment with Papa John's: a raise from $425 to $450 per week on January 1, 1996, and a raise from $450 to $650 per week on July 1, 1996. (Ct. App. JA 627, 223). Petitioner typically received store performance bonuses during his first three years of employment, ranging from $700 to $2,000 per month. (Ct. App. JA 605).

In 1996, Petitioner's Area Supervisor evaluated his job performance. The written evaluation noted several areas needing improvement, including product quality, management and employee training, time management, and handling of customer complaints. Petitioner's Area Supervisor also counseled Petitioner to take vacation time to avoid "burn out." (Ct. App. JA 627, 211). Petitioner's Area Supervisor, on several occasions, instructed Petitioner to decrease his labor costs in accordance with the store's labor budget percentage. (Ct. App. JA 617).

By the late 1990's, several changes occurred within Papa John's. Papa John's experienced a major growth period. (Ct. App. JA 369-75, 436-37, 506-07, 625). As part of the necessary formalities that accompany such an expansion, the corporate office began holding management employees more

accountable for day to day store operations and financial statements. Papa John's managers could no longer operate each individual store as they saw fit. Papa John's became a complex, publicly-traded corporation which demanded structure, formality and tightened financial standards. Petitioner acknowledges that, during this period, the corporate climate changed and expectations were higher. (Ct. App. JA 625).

By early 1999, Petitioner began having serious problems meeting the legitimate expectations of his superiors. Petitioner disregarded directives to manage his labor supply in accordance with the percentage mandated by the corporate office. (Ct. App. JA 617). Petitioner's food costs were higher than allowable for his store to operate efficiently. (Ct. App. JA 625). Petitioner acknowledged that there are two ways to increase store profits: increase sales and/or decrease costs. (Ct. App. JA 630). He also acknowledged that a high-volume store, such as his, increases profits by decreasing costs. (Ct. App. JA 630). Ultimately, because of his deficiencies in meeting food and labor budget goals, Petitioner was required to attend management training meetings in nearby Nashville, Tennessee. (Ct. App. JA 812). Despite the many warnings and training sessions, Petitioner's problems with food and labor costs continued. (Ct. App. JA 617, 625, 706).

During this time, Petitioner complained about store maintenance and repair. Because Papa John's corporate office planned to relocate or rebuild Store 83, it was reluctant to expend large sums of money to replace equipment or renovate the building. (Ct. App. JA 708). Nevertheless, basic repairs requested by Petitioner were performed and the store was fully operational. (Ct. App. JA 609). Moreover, the store had the potential to look even better, but Petitioner

himself failed to follow through with several of his requests for improvements. Despite permission or authority to act, Petitioner failed to remedy a broken fence, secure extra seating, purchase and change light bulbs in the menu board, and wash windows. (Ct. App. JA 724, 725, 733, 706.)

By 2000, sales at Store 83 began to slip even farther, and Petitioner's food and labor costs remained higher than budget goals. (Ct. App. JA 649, 799, 614-15). Store 83 consistently had one of the highest labor percentages in its area. (Ct. App. JA 718). Petitioner did have one good sales month in April 2000 when Papa John's celebrated its anniversary by offering special deals on pizzas. (Ct. App. JA 223). Petitioner's coupon-based "success" in April 2000 was short lived; by May 2000, Store 83's numbers dropped and remained low in June 2000. (Ct. App. JA 814-15, 358).

In addition to his store's poor performance, Petitioner failed or refused to implement Papa John's computerized Labor Management System. (Ct. App. JA 710, 647). Petitioner also failed or refused to instruct his employees to use company-mandated portion control cups to ensure that each pizza conformed to Papa John's quality and appearance standards and to decrease wasted product by applying too many ingredients. Petitioner rationalized that the use of the portion control cups was too time-consuming. (Ct. App. JA 643-44).

Because of Store 83's poor sales and Petitioner's failings, Papa John's prepared a performance improvement plan which set out specific areas where Petitioner needed improvement. (Ct. App. JA 309). To ensure that Petitioner had a fair opportunity to achieve the plan's goals, it contained a 25% margin of error relating to the allowance for food waste and labor costs. The plan was clear, however, that if the stated

goals were not met, a management change would occur. (Ct. App. JA 309, 225). Petitioner expressed his unhappiness with the plan and refused to sign it. (Ct. App. JA 631).

In refusing to sign the performance improvement plan, Petitioner raised several business related issues that were without merit and reflected no indicia of race discrimination. Indeed, with regard to Petitioner's allegations otherwise, the record is clear that:

- *All* managers in Petitioner's area were required to attend mandated meetings, not just Petitioner. (Ct. App. JA 634).

- Petitioner set his own schedule and presented no evidence that his vacation requests were ever denied. (Ct. App. JA 672-73, 245).

- Petitioner obtained permission from his supervisors to work on holidays. No one required him to do so. (Ct. App. JA 612).

- There is no evidence that Petitioner was not supported in reasonable marketing and advertising efforts subject to budget constraints. (Ct. App. JA 837).

- Petitioner admitted that he failed to retrieve uniforms from former employees. (Ct. App. JA 648-49).

- There is no evidence that Petitioner's store was insufficiently staffed. If anything, his store's excessive labor costs show overstaffing. (Ct. App. JA 646).

- All Papa John's store managers were required to balance and control labor costs. Proper employee training and management would have increased the efficiency of Store 83. (Ct. App. JA 817).

It is also imperative to note that Petitioner never raised the issue of race discrimination prior to or as a part of his complaints against the performance improvement plan. It appeared for the first time in an EEOC charge filed long after the termination of Petitioner's employment. (Ct. App. JA 653, 237).

On August 17, 2000, Petitioner met with his area supervisors to discuss his progress and his complaints against the performance improvement plan. (Ct. App. JA 640, 751). Petitioner refused to participate in any discussions and later stated that "I just did not feel that it was necessary for me to give them that information at that point in time." (Ct. App. JA 642). When repeated attempts to implore Petitioner to discuss his progress, his complaints, and the performance improvement plan failed, Papa John's terminated Petitioner's employment. (Ct. App. JA 722). Petitioner made no attempt to salvage his job by providing any of the requested information. He instead chose to leave the room. (Ct. App. JA 641-42, 722). Petitioner refused to sign the status sheet confirming his discharge, just as he had refused to sign the performance improvement plan. (Ct. App. JA 233).

Therefore, despite Petitioner's unfounded statement that he was "terminated without cause" (Pet. at 7), Papa John's decision to terminate Petitioner's employment was at least two-fold: (1) his refusal and unwillingness to accept the performance improvement plan and (2) his persistent issues with food and labor costs up through his discharge. (Ct. App. JA 642, 233).

At no time before or during this meeting did Petitioner claim that he had been discriminated against at any time during his employment with Papa John's. (Ct. App. JA 640). Petitioner admitted that he never heard any of his supervisors use racial slurs at any time during his employment with Papa John's. (Ct. App. JA 614).

Petitioner filed suit against Papa John's in 2002, claiming that his termination was a result of race-based discrimination in violation of Title VII of the Civil Rights Act of 1964. Petitioner also claimed that he was illegally denied compensation for overtime worked as required by the Fair Labor Standards Act ("FLSA"). On February 2, 2004, at the completion of extensive discovery, Papa John's moved for summary judgment. On November 15, 2004, the District Court granted Papa John's motion for summary judgment on both counts, concluding that Petitioner failed to present a prima facie case of discrimination and that he was an exempt managerial employee under the FLSA. Properly reviewing the District Court's decision *de novo*, the Sixth Circuit affirmed summary judgment in Papa John's favor on December 20, 2006.

Pursuant to the District Court's ruling, Papa John's filed a motion for attorney fees, costs, and litigation expenses incurred in defending the case. Papa John's also moved for sanctions against Petitioner's counsel for pursuing the FLSA claim to summary judgment after the evidence clearly demonstrated that there was no factual or legal basis to support the claim. The District Court awarded Papa John's costs as the prevailing party under Fed. R. Civ. P. 54(d)(1) in the amount of $3,334.50 and attorney fees in the amount of $5,000. The attorney fees were awarded pursuant to Fed. R. Civ. P. 11 and 28 U.S.C. § 1927 because the District Court found that Petitioner's counsel knew or should have known

that Petitioner was exempt from the FLSA and that the claim lacked a factual basis. Contrary to Petitioner's misleading and confusing statements otherwise, the District Court did *not* award attorney fees or costs under the fee-shifting provisions of the substantive statutes at issue – Title VII and the FLSA – but under the generally applicable provisions of federal law found at 28 U.S.C. § 1927, Fed. R. Civ. P. 11, and Fed. R. Civ. P. 54. On June 11, 2007, the Sixth Circuit, properly reviewing the District Court's decision for abuse of discretion, affirmed the District Court's judgment.

REASONS THE PETITION SHOULD BE DENIED

The decisions below do not conflict with a decision of this Court or any Court of Appeals, nor do they implicate a federal question that has not been decided by this Court. Accordingly, Petitioner has not carried his burden of demonstrating any "compelling reasons" for the Petition to be granted. *See* Sup. Ct. R. 10.

I. THE DECISIONS BELOW ARE ENTIRELY CONSISTENT WITH THE BURDEN SHIFTING FRAMEWORK SET FORTH IN MCDONNELL DOUGLAS.

Title VII single-motive claims proceeding on circumstantial evidence, such as this case, are analyzed under the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and later modified by *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). This framework first requires that the plaintiff establish a prima facie case. *DiCarlo v. Potter*, 358 F.3d 408, 414 (6th Cir. 2004). Once a prima facie case has been shown, the plaintiff is entitled to a rebuttable presumption that the defendant discriminated

against him or her in violation of Title VII. *Burdine,* 450 U.S. at 254. The defendant then bears the burden of production to put forth a "legitimate, nondiscriminatory reason" for the complained of adverse treatment. *Id.* at 253. "The explanation provided must be legally sufficient to justify a judgment for the defendant." *Id. at* 255. If the defendant meets this burden, the presumption of discrimination created by the prima facie case falls away, *id.* & n. 10, and the plaintiff then needs to show that the defendant's "'legitimate nondiscriminatory reason'" was a "'pretext for discrimination.'" *Id.* at 253. Throughout this burden-shifting approach, the plaintiff continues to bear the ultimate burden of proving, by a preponderance of the evidence, the intent to discriminate. *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 509 (1993).

To demonstrate a prima facie case, the plaintiff must show that "(1) he or she was a member of a protected class; (2) he or she suffered an adverse employment action; (3) he or she was qualified for the position; and (4) he or she was replaced by someone outside the protected class or was treated differently than similarly-situated, non-protected employees." *DiCarlo,* 358 F.3d at 415.

In this case, the Sixth Circuit held that Petitioner did demonstrate a prima facie case. After reaching such a conclusion, the Sixth Circuit then properly shifted the burden to Papa John's to articulate a legitimate, non-discriminatory reason for Petitioner's termination. The Sixth Circuit found that Papa John's did just that, noting that Papa John's decision to discharge Petitioner was two-fold: (1) Petitioner's refusal to discuss with his superiors certain "integrity issues" and his unwillingness to accept the performance improvement plan; and, (2) Petitioner's persistent issues with food and labor

costs up through his discharge. (Ct. App. JA 175, 205, 209, 617, 625-26, 639, 642, 715, 717, 744, 809).

The Sixth Circuit, again properly employing the *McDonnell Douglas* burden shifting framework, required that Petitioner show that Papa John's legitimate and non-discriminatory reasons were a pretext for discrimination. To demonstrate that Papa John's reasons for terminating Petitioner's employment were pretextual, Petitioner was required to show that Papa John's stated reasons: (1) have no basis in fact; (2) did not actually motivate Papa John's to terminate Petitioner's employment; or, (3) were insufficient to warrant Petitioner's discharge. *Tysinger v. Police Dept. of City of Zanesville*, 463 F.3d 569, 576 (6th Cir. 2006).

Petitioner did nothing more than submit a self-serving affidavit regarding his own personal perception of his performance and written evaluations. The Sixth Circuit, noting that Papa John's expectations for Petitioner were undisputed and that Papa John's had fired other managers for failing to meet those same standards, was not persuaded by Petitioner's affidavit. The Sixth Circuit properly found the record to be clear that Papa John's and Petitioner's supervisors were dissatisfied with his performance and actively tried to help him improve Store 83's performance. As noted by the Sixth Circuit, Petitioner presented no evidence whatsoever contradicting Papa John's expectations, his failure to meet those expectations, or his unwillingness to accept the performance improvement plan. Petitioner failed to present any evidence that his inability to meet Papa John's standards did not motivate Papa John's decision to terminate his employment. Furthermore, Petitioner failed to offer any evidence that discrimination was the real reason for his discharge.

Petitioner apparently believes that summary judgment is precluded in a Title VII action if and when a prima facie case has been demonstrated. That is simply not the case.

> If the bare bones elements of plaintiff's prima facie case were sufficient to make this showing, ... the entire 'burden shifting' analysis of *McDonnell Douglas* and its successors would be illusory ... Accordingly, we hold that, in order to make this type of rebuttal showing, *the plaintiff may not rely simply upon his prima facie evidence, but must, instead, introduce additional evidence of [prohibited] discrimination*.

Peters v. Lincoln Electric Co., 285 F.3d 456, 472 (6th Cir. 2002) (emphasis added). In this case, Petitioner introduced *no* evidence of prohibited discrimination in rebuttal of Papa John's legitimate, non-discriminatory reasons for the termination of Petitioner's employment.

Petitioner cites to *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133 (2000) to support his Petition. (Pet. at 11-12). Petitioner's citation to *Reeves*, however, is inaccurate and misleading. Petitioner states that this Court in *Reeves* held that once a plaintiff establishes his prima facie case, then the employer must come forward with a legitimate, non-discriminatory basis for its actions. That much is true. Petitioner then states that this Court in *Reeves* held that if the employer's explanation is not credible, then the plaintiff does not need to produce further evidence of discriminatory intent. That is not what this Court held in *Reeves*. To the contrary, this Court in *Reeves* held that the employer's burden to produce evidence of a legitimate, non-discriminatory reason for a plaintiff's termination is "one of production, not persuasion; it 'can involve *no* credibility assessment.'" *Id.* at

142 quoting *St. Mary's Honor Center*, 509 U.S. at 509 (emphasis added). Petitioner's description of *Reeves* is disingenuous.

This Court's decision in *Reeves* is consistent with *McDonnell Douglas* and *St. Mary's Honor Center*, and the Sixth Circuit's opinion in this case is entirely consistent with those cases as well as existing Sixth Circuit case law. Once Papa John's produced legitimate, non-discriminatory reasons for Petitioner's discharge, *Reeves* required Petitioner to "prove by a preponderance of the evidence that the legitimate reasons offered by [Papa John's] were not its true reasons, but were a pretext for discrimination." 530 U.S. at 143. Petitioner failed to present *any* such evidence. Accordingly, the Sixth Circuit properly affirmed the District Court's grant of summary judgment for Papa John's.

II. PETITIONER'S REFERENCE TO "STATISTICAL EVIDENCE" IN THE PETITION IS DEFICIENT.

Petitioner argues that discrimination can be proved by presenting a "statistical pattern in the actual workplace where the discrimination occurred." (Pet. at 13.) Petitioner then states that he has shown a pattern of discrimination. Petitioner states that there were no other black managers, that he was denied money to repair his store, and that he received no assistance for certain increased costs. (Pet. at 13.)

First, statistical evidence is not relevant in a disparate treatment case. *See, e.g., Smith v. Leggett Wire Co.*, 220 F.3d 752, 762 (6th Cir. 2000); *Plair v. E.J. Brach & Sons, Inc.*, 105 F.3d 343, 349 (7th Cir. 1997) (holding statistics to be "improper vehicles to prove discrimination in disparate treatment (as opposed to disparate impact) cases").

Second, even if statistical evidence were appropriate in this case, Petitioner has failed at all stages to offer sufficient information for this Court, or any other court, to consider in evaluating the reliability or probative value of his statistical arguments. Petitioner's "statistical evidence" has no probative value whatsoever to his claim of discrimination. Petitioner has failed to introduce *evidence* regarding the relevant labor market; Petitioner has failed to introduce *evidence* identifying the number of minorities in the relevant labor market; and, Petitioner has failed to introduce *evidence* as to how many African-American individuals were available, and qualified, in the relevant market to work as a general manager of a Papa John's restaurant. In sum, Petitioner's statistical "proof" fails to support an inference of discrimination.

III. PETITIONER HAS FAILED TO PRESENT EITHER AN INTRA-CIRCUIT OR AN INTER-CIRCUIT CONFLICT AMONG THE COURTS.

Petitioner initially alleges that the Sixth Circuit in this case deviated from its prior decisions in *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651 (6th Cir. 2000), *McClain v. NorthWest Community Corrections Center Judicial Corrections Bd.*, 440 F.3d 320 (6th Cir. 2006), *Wright v. Murray Guard, Inc.*, 455 F.3d 702 (6th Cir. 2006), and *Tysinger v. Police Dept. of City of Zanesville*, 463 F.3d 569, 576 (6th Cir. 2006). Petitioner's remedy for a perceived intra-circuit conflict is an en banc review. *See Moody v. Albemarle Paper Co.*, 417 U.S. 622, 627 (1974) (en banc proceedings are to secure or maintain uniformity of decisions within a circuit); *United States v. American-Foreign S.S. Corp.*, 363 U.S. 685 (1960) (principal utility of en banc proceedings is to secure uniformity of decisions within a circuit); *United States v. Sotelo-Murillo*, 887 F.2d 176, 179 (9th Cir. 1989) (an intra-

circuit conflict may be resolved only through en banc proceedings). Petitioner did in fact seek en banc review. The Sixth Circuit received Petitioner's petition for rehearing en banc, the petition was circulated among all active judges of the court, and *not one* of the judges requested a vote on the suggestion for rehearing en banc. Accordingly, the Sixth Circuit denied the petition for rehearing en banc.

Petitioner, having failed to demonstrate an intra-circuit conflict, switches gears and now contends that there is an inter-circuit conflict. Petitioner states that the Sixth Circuit has "fractured the law" with its decision in this case. (Pet. at 7.) Petitioner, however, fails to identify any opinion from any other circuit that is in conflict with the Sixth Circuit's decision in this case. Petitioner's argument essentially boils down to a contention that the District Court erred in granting summary judgment in Papa John's favor, and that the Sixth Circuit erred in affirming the District Court's decision. Chief Justice Taft made it clear long ago that the Supreme Court cannot function as an ordinary appellate court concerned with achieving justice in individual cases; rather, the Court is to grant a writ of certiorari in only those cases involving important public matters and in cases where there is a "real and embarrassing conflict of opinion" between the circuit courts of appeal. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 392-93 (1923). Former Chief Justice Rehnquist has written that instead of seeking merely to correct erroneous decisions, the Court is looking for cases "involving unsettled questions of federal constitutional or statutory law of general interest." REHNQUIST, THE SUPREME COURT: HOW IT WAS, HOW IT IS, p. 269 (William Morrow & Co. 1987). Clearly, this case does not fit the former Chief Justice's description.

This case presents no intra-circuit conflict – the en banc Sixth Circuit has confirmed that fact, and this case presents no inter-circuit conflict, Petitioner having failed to identify any opinions in conflict with the Sixth Circuit's decision. Furthermore, this case does not involve any matters of great public concern. Accordingly, the Court should deny the Petition.

IV. THE DISTRICT COURT'S IMPOSITION OF ATTORNEY FEES AND SANCTIONS AGAINST PETITIONER AND HIS COUNSEL IS REVIEWED FOR ABUSE OF DISCRETION, THE LOWER COURT DID NOT ABUSE ITS DISCRETION, AND THERE ARE NO COMPELLING REASONS TO GRANT THE PETITION.

A district court's decision to impose sanctions under Fed. R. Civ. P. 11 or attorney fees under 28 U.S.C. § 1927 is reviewed for abuse of discretion. *Ridder v. City of Springfield*, 109 F.3d 288, 293, 298 (6th Cir. 1997). This highly deferential standard of review allows a range of choices for the district court, so long as the choice does not constitute a clear error of judgment. *See Kern v. TXO Prod. Corp.*, 738 F.2d 968, 971 (8th Cir. 1984) (abuse of discretion review "presupposes a zone of choice within which the trial courts may go either way"); *see also Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 374, 405 (1990) (a court abuses its discretion if it bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence). Accordingly, even if this Court would not have imposed sanctions or attorney fees on its own accord does not mean that the District Court abused its discretion in doing so.

A. The District Court did not abuse its discretion in imposing sanctions and attorney fees against Petitioner and his counsel.

If evidentiary support for a pleaded contention is not obtained after a reasonable opportunity for investigation and discovery, then the party has a duty under Fed. R. Civ. P. 11 not to persist with that contention. *Mann v. C & G. Mfg., Inc.*, 900 F.2d 953, 958-59 (6th Cir. 1990), *cert. denied*, 498 U.S. 959 (1990); Fed. R. Civ. P. 11 Advisory Committee Notes (1993 Amendments). Fed. R. Civ. P. 11 provides, in pertinent part:

> By presenting to the court ... a pleading ... an attorney ... is certifying that to the best of [his] knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, ... *the allegations and other factual contentions have evidentiary support* or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.... (Emphasis added).

Petitioner and his counsel violated Rule 11. Considering the above-standard in relation to Petitioner's FLSA claim, the District Court clearly did not abuse its discretion in awarding Papa John's fees and costs. Petitioner and his counsel knew *prior to filing this action* that Petitioner was an exempt managerial employee and, as such, not entitled to overtime. Petitioner then expressly admitted during his deposition on October 21, 2003 that he never expected to receive compensation for overtime work and that he was never entitled to overtime pay. (Ct. App. JA 600-01, 671). Petitioner knew his compensation scheme, and Petitioner's counsel knew his client's deposition testimony; nevertheless,

Petitioner and his counsel pursued the FLSA claim through the conclusion of the summary judgment stage. Petitioner required Papa John's to brief the motion fully, and required the District Court to deliberate on the motion fully, instead of withdrawing the claim. Only after receiving an adverse decision from the District Court did Petitioner finally abandon the FLSC claim on appeal.

Despite the overwhelming evidence and admissions made during Petitioner's deposition, he and his counsel continued to perpetuate the baseless allegation that Petitioner was entitled to overtime pay. The insupportable allegations in Petitioner's Complaint, summary judgment response, and Affidavit present textbook examples of Rule 11 violations. Therefore, the District Court's holding that "Plaintiff's counsel's decision to pursue the [FLSA] claim to the summary judgment stage was unreasonable under the circumstances and in violation of his duty to the court under Rule 11," (Ct. App. JA 1117), was neither arbitrary nor unjustified.

B. There are no compelling reasons to grant the Petition as it concerns the imposition of sanctions and attorney fees against Petitioner and his counsel.

While the decision to impose sanctions and attorney fees is reviewed for abuse of discretion, Petitioner must also carry his significantly more strenuous burden of demonstrating that there are compelling reasons to grant the Petition. *See* Sup. Ct. R. 10 ("a petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"). Petitioner has not carried his burden because this case is wholly unremarkable and one in which the District Court exercised its considerable discretion under Fed. R. Civ. P. 11

and 28 U.S.C. § 1927. Even if Petitioner and his counsel were erroneously assessed fees and costs of $8,334.50 – which they have never paid – it would not warrant granting the Petition.

CONCLUSION

Petitioner has not established any compelling reasons for this Court to grant the Petition. Therefore, Papa John's respectfully requests that the Court deny the Petition.

Respectfully submitted,

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